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IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

—v.—

E. PIERCE MARSHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONER FOR *AMICI CURIAE* PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, RALPH BRUBAKER, ERWIN CHEMERINSKY, ROBERT D'AGOSTINO, S. ELIZABETH GIBSON, ROBERT M. LAWLESS, CHARLES MOONEY, C. SCOTT PRYOR, NANCY RAPOPORT, ROBERT K. RASMUSSEN, KEITH SHARFMAN, ETTIE WARD AND ROBERT M. ZINMAN

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INTEREST OF AMICI CURIAE[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law and bankruptcy jurisdiction.[2] They are deeply interested in this case because of the important effect its outcome could have on the scope of bankruptcy jurisdiction. The *Amici* file this *pro bono* brief to offer what assistance they can to the Court as it considers and decides whether the broad and unqualified jurisdiction specially conferred by Congress on the courts of bankruptcy is cut down by the judicially-created probate exception so as to exclude from their jurisdiction any matter that might affect a decedent's legatees or heirs.

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[1] This brief has been prepared *pro bono*. Pursuant to Rule 37 of the Rules of this Court, the *Amici* file this brief with the written consent of both parties, which are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* are Richard Aaron, Professor of Law, S.J. Quinney College of Law, University of Utah; Jagdeep S. Bhandari, Professor of Law, Florida Coastal School of Law; Susan Block-Lieb, Professor of Law, Fordham Law School; Ralph Brubaker, Professor of Law and Mildred Van Voorhis Jones Faculty Scholar, University of Illinois College of Law; Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science, Duke University; Robert D' Agostino, Professor of Law, John Marshall Law School; S. Elizabeth Gibson, Burton Craige Professor of Law, University of North Carolina at Chapel Hill; Robert M. Lawless, Gordon & Silver, Ltd. Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas; Charles W. Mooney, Jr., Charles A. Heimbold, Jr. Professor of Law, University of Pennsylvania Law School; C. Scott Pryor, Professor of Law, Regent University School of Law; Nancy Rapoport, Dean and Professor of Law, University of Houston Law Center; Robert K. Rasmussen, Professor of Law, Vanderbilt Law School; Keith Sharfman, Professor of Law, Rutgers University School of Law; Ettie Ward, Professor of Law, St. John's University School of Law; and Robert M. Zinman, Professor of Law, St. John's University School of Law.

In supporting Petitioner and seeking reversal of the decision of the Circuit Court, the *Amici* urge the Court to hold that the probate exception does not limit the bankruptcy jurisdiction broadly conferred by 28 U.S.C. § 1334, and that the bankruptcy-related abstention provisions in 28 U.S.C. § 1334(c), which include the role of state courts and state law among its relevant abstention considerations, govern the circumstances in which bankruptcy jurisdiction shall not be exercised. This brief focuses on the issue by emphasizing the special nature of the bankruptcy jurisdiction and abstention statutes, whereas the Circuit Court viewed this bankruptcy case from the vantage point of a decedent's heirs and legatees and state probate courts.

SUMMARY OF ARGUMENT

This is a bankruptcy case. The issue posed is whether the judicially-crafted probate exception nullifies a portion of the unqualified bankruptcy jurisdiction conferred by Congress on the courts of bankruptcy under 28 U.S.C. § 1334(b) and (e). This bankruptcy case should not be decided by focusing on a decedent's estate. As the Circuit Court itself recognized, "this case does not involve the administration of an estate, the probate of a will, or any other purely probate matter . . . ." 392 F.3d at 1133. Nor would the judgment granted by the District Court (the "court of bankruptcy") in the exercise of its bankruptcy jurisdiction and voided by the Circuit Court, have been enforceable against the estate of the Petitioner's deceased husband, but only against the defendant, who is her stepson and the Respondent herein.

The court of bankruptcy below, exercising its bankruptcy jurisdiction, granted an approximate $88 million judgment to the Petitioner-Debtor (the "Debtor") on her

claim against Respondent for his tortious interference with her expectancy of an *inter vivos* gift from her husband, only to be vacated on the basis of the Circuit Court's holding that the probate exception removed the Debtor's tort claim from the broad and unqualified statutory bankruptcy jurisdiction conferred by Congress.

Although the Circuit Court stated that it was only "incidentally . . . required to determine whether the probate exception applies in a bankruptcy case," 392 F.3d at 1121, the central issue in this case involves whether the probate exception cancels a portion of the bankruptcy jurisdiction conferred by Congress on the courts of bankruptcy, not the role of state probate courts or state probate law. Moreover, although this was a bankruptcy case, the Circuit Court did not even review the District Court's order dated July 20, 2001 denying Respondent's motion for abstention predicated on 28 U.S.C. § 1334(c)(1) and (2),[3] although it could have reviewed the denial of his subsection (c)(2) motion on his appeal from the final judgment.[4] Instead, the Circuit Court addressed, as the only question, whether the probate exception cut out a portion of the unqualified bankruptcy jurisdiction conferred by 28 U.S.C. § 1334. As stated by the Circuit Court, "[o]ur

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[3] The District Court's order denying abstention pursuant to 28 U.S.C. § 1334(c) is in the Supplemental Excerpts of the Record of the Ninth Circuit, at 8593.

[4] By virtue of 28 U.S.C. § 1334(d), the District Court's order denying § 1334(c)(1) abstention was not subject to review by the Circuit Court, whereas the limitation on its appellate jurisdiction by that provision did not apply to the denial of § 1334(c)(2) abstention. In any event, because Respondent did not contend in the Ninth Circuit briefing that the District Court's ruling on abstention was erroneous, the issue was waived. *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Administration*, 342 F.3d 924, 933 (9th Cir. 2003).

jurisdiction on the merits depends upon whether the probate exception to federal court jurisdiction applies," 392 F.3d at 1121, and it held that bankruptcy jurisdiction conferred by 28 U.S.C. § 1334 succumbed to the probate exception.

By holding that the probate exception placed the Debtor's tort claim outside the jurisdiction of the court of bankruptcy, the Circuit Court brought a concept into 28 U.S.C. § 1334 that is nowhere in that statute, and read § 1334 as if it automatically excluded a portion of the jurisdiction it conferred. This invaded the province of Congress by judicially amending the bankruptcy jurisdictional statutes to narrow their scope. Without even mentioning the bankruptcy abstention provisions in 28 U.S.C. § 1334(c), the Circuit Court addressed, as the only question, whether the probate exception cut out a portion of the unqualified bankruptcy jurisdiction conferred by § 1334(b) and (e).

Amici proffer several reasons explaining why the probate exception does not apply to this and other cases within the jurisdiction conferred by 28 U.S.C. § 1334 on the courts of bankruptcy.

First, the plain text of § 1334(b) and (e) broadly grants jurisdiction of the Debtor's tortious interference claim because it is "related to" her bankruptcy case, and also consists of "property of the estate," which includes a debtor's causes of action. None of the language of § 1334 or of any other statute provides a basis for reading out of the statute any of the jurisdiction so conferred. Thus, with its decision, the Circuit Court essentially repealed part of the bankruptcy statute when it applied the probate exception to bankruptcy.

Second, the principle of *Markham v. Allen*, 326 U.S. 490, 495 (1946), is controlling. In that case, the probate

exception was held not to impair the district court's jurisdiction *specially* granted by a specific federal statute even thought the decedent's estate was undergoing administration in a probate court. Under the Court's analysis, the probate exception, developed under the diversity jurisdiction statute conferring jurisdiction generally on the district courts, could not be read to limit the district court's specially conferred jurisdiction pursuant to the Trading With the Enemy Act. Likewise, 28 U.S.C. § 1334 is a special jurisdictional statute; it grants broad bankruptcy jurisdiction as a means to accomplish the purposes of the bankruptcy law.

Third, although a federal court has an unflagging duty to exercise its jurisdiction, and not to abstain in the absence of exceptional circumstances that may exist in a particular case, a court of bankruptcy, in deciding whether to abstain from hearing a proceeding within its jurisdiction, is not limited to examining bankruptcy considerations. Section 1334(c)'s abstention provisions contemplate that the court give consideration to numerous factors, including the interest of the debtor and creditors, as well as the administration of a decedent's estate for the benefit of its legatees and heirs. Accordingly, the probate exception, concerned with one factor only, has no place in the bankruptcy context in which the courts of bankruptcy are guided by many considerations in deciding whether to abstain.

Fourth, the goals of bankruptcy, to centralize bankruptcy litigation and to maximize the debtor estate for the benefit of the creditors, guide the interpretation of § 1334. The cancellation by the Circuit Court of a portion of the bankruptcy jurisdiction conferred by Congress by means of the probate exception interferes with Congress' purpose in creating broad bankruptcy juris-

diction and its intention that all property of the debtor be brought into the estate.

Fifth, a party who invokes bankruptcy jurisdiction cannot thereafter seek to void it. Respondent filed both a proof of claim and an adversary proceeding against the Debtor in this bankruptcy case. By so proceeding, Respondent invoked bankruptcy jurisdiction as a means to contest her position and to challenge her right to receive a discharge in bankruptcy. In response, the Debtor filed a counterclaim against Respondent for tortious interference with her expectancy of an *inter vivos* gift. Having invoked the jurisdiction of a court of bankruptcy by an action in which the Debtor counterclaimed, Respondent cannot thereafter assert that the court of bankruptcy could no longer exercise its statutory jurisdiction.

ARGUMENT

I. A PLAIN TEXT READING OF 28 U.S.C. § 1334 DEMONSTRATES THAT THE PROBATE EXCEPTION IS INAPPLICABLE IN THE BANKRUPTCY CONTEXT.

28 U.S.C. § 1334(b) grants to the courts of bankruptcy non-exclusive jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases under title 11," and 28 U.S.C. § 1334(e) confers exclusive jurisdiction on such courts of all "property of the estate."[5] Upon the commencement of a bankruptcy case,

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[5] On April 20, 2005, the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (119 Stat. 98), 28 U.S.C. § 1334 was amended by that Act by adding subsection (e)(2) and a reference to (e)(2) in subsection (b). Subsection (e)(1) maintains the substance of former (e), which continues to apply to this pre-April 20, 2005 case because it was commenced before such date. The effective date provision is set forth in Pub. L. No. 109-8,

11 U.S.C. § 541 provides for the creation of an estate, broadly extending to all "legal or equitable interests of the debtor," including causes of action of the debtor. *See* H.R. REP. NO. 95-595, at 367 (1977) ("[S]ection [541] defines property of the estate, and specifies what property becomes property of the estate . . . . It includes all kinds of property, including tangible or intangible property [and] *causes of action*.") (emphasis added). Proceedings on a debtor's cause of action are obviously "related to" the estate, and thus fall within this jurisdictional grant, *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995), and as "property of the estate," such proceedings are within the exclusive jurisdiction conferred on the courts of bankruptcy by § 1334(e).

The question then is whether the pervasive scope of these bankruptcy jurisdictional statutes will be broadly read as written, or instead narrowed by implying an exception.

Determining the meaning of a statute requires a court first to address the language of the statute for its plain meaning. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). This Court has specifically recognized on several occasions that when "the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Hartford Underwriters Insurance Co. v. Union Planters*

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§ 324(a)(2), (b), 119 Stat. 98, 216 (2005). The purpose of the amendment is to prevent a court of bankruptcy from abstaining from hearing claims such as malpractice claims against bankruptcy professionals, so that they may be tried before the bankruptcy judges who authorized their appointment, instead of before a state court jury. *See* Kenneth N. Klee, The Bankruptcy Abuse Prevention & Consumer Protection Act of 2005-Business Bankruptcy Amendments, SK092 ALI-ABA (2005).

Bank, N.A., 530 U.S. 1, 6 (2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 241, quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

It takes no more than a plain reading of § 1334(b) and (e) to reach the conclusion which comports with the reading of § 1334 urged by *Amici*: There is no room in the plain text of § 1334 to restrict or to limit the jurisdiction of the courts of bankruptcy by engrafting a probate exception onto the statute. Congress explicitly provided in § 1334 that courts of bankruptcy are to have broad and comprehensive jurisdiction: First, under § 1334(e), courts of bankruptcy are to have "exclusive" jurisdiction "of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . ." 28 U.S.C. § 1334(e). The Debtor's tort claim is "property of the estate" within the meaning of both 28 U.S.C. § 1334 and 11 U.S.C. § 541. Second, congressional intent is obvious from the broad and comprehensive jurisdiction conferred on courts of bankruptcy by the plain language of § 1334(b): ". . . the [courts of bankruptcy] shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11." 28 U.S.C. § 1334(b) (emphasis added).

There is no indication that Congress intended to limit or restrict this broad grant of jurisdiction by a judicial doctrine such as the probate exception. Indeed, in enacting America's first bankruptcy law, the Bankruptcy Act of 1800 (2 Stat. 19-36), Congress gave no hint that it intended to limit the specially conferred bankruptcy jurisdiction by the probate exception. Nor did Congress give any such hint in any of its subsequent bankruptcy acts, enacted in 1841 (5 Stat. 440), 1867 (14 Stat. 517), 1898 (30 Stat. 544, 545), 1938 (52 Stat. 840), 1978 (92 Stat. 2549), or the statute applicable to this case, enacted in 1984 (98 Stat. 333).

The probate exception should not be applied as a limitation on bankruptcy jurisdiction because that would undercut the administration of bankruptcy cases and application of the bankruptcy law by the courts of bankruptcy. For example, the probate exception, if applicable to bankruptcy, could bar a bankruptcy trustee's proceeding in a court of bankruptcy to recover a fraudulent conveyance or voidable preference received by a transferee of property who thereafter dies, or could impair the enforcement of the automatic stay under 11 U.S.C. § 362 by a court of bankruptcy against an executor or heir of an estate in administration.

Respondent asks the Court to read the judicially-created probate exception into § 1334 as a limitation, although no restriction exists in the language of the statute. *Amici* urge this Court, therefore, to enforce the terms of § 1334 as written by Congress, and to hold that the probate exception did not bar the courts of bankruptcy from exercising their § 1334 jurisdiction of the Debtor's tort claim.

II. UNDER THE THEORY OF *MARKHAM V. ALLEN*, THE PROBATE EXCEPTION IS INAPPLICABLE BECAUSE 28 U.S.C. § 1334 "SPECIALLY CONFERS" JURISDICTION ON THE COURTS OF BANKRUPTCY.

A. The Probate Exception Has No Place in the Context of Bankruptcy Jurisdiction.

The probate exception has not been addressed by this Court since the seminal case of *Markham v. Allen*, 326 U.S. 490 (1946), an action against the executor of an estate in administration in a state probate court and the decedent's heirs. In *Markham v. Allen*, the district court, pursuant to its specially conferred jurisdiction under the

Trading With the Enemy Act, granted a judgment declaring that the Custodian under that Act, rather than the decedent's heirs, was to receive the net proceeds of the decedent's estate. *Id.* at 495. Reversing the Ninth Circuit, this Court affirmed the judgment, reasoning that because the Trading With the Enemy Act specially conferred jurisdiction on the district court for suits grounded on the provisions of that Act "independently of the statutes governing generally jurisdiction of the federal courts," *id.* at 495, the probate exception was not applicable to limit such specially granted jurisdiction.

Similarly, under the theory of *Markham v. Allen*, the probate exception is inapplicable to an action within the specially conferred jurisdiction of the courts of bankruptcy. Section 1334 is clearly a special grant of jurisdiction by Congress, intending to establish the paramount nature of bankruptcy jurisdiction. *See New Haven Inclusion Cases*, 399 U.S. 392, 426 (1970) (establishing the "primary jurisdiction in the reorganization court[s]"); *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217 (1912) ("[I]t is a necessary conclusion . . . that the jurisdiction of the [courts of] bankruptcy is intended to be exclusive of all other courts . . . ."). In this case, as in *Markham v. Allen*, the Ninth Circuit erred by engrafting a limitation on the exercise of jurisdiction instead of adhering to the special bankruptcy jurisdictional provisions enacted by Congress. Moreover, the judgment entered in the Debtor's favor had no more impact on "probate jurisdiction [or] property in the possession or custody of a state court," 326 U.S. at 495, than did the judgment sustained in *Markham v. Allen*. The judgment should be reinstated.

B. Congress Did Not Intend to Abrogate the Theory of *Markham v. Allen* When It Enacted 28 U.S.C. § 1334.

Congress granted pervasive bankruptcy jurisdiction to the courts of bankruptcy in order "that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate" in a centralized forum. *Celotex Corp. v. Edwards*, 514 U.S. at 308, citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Congress envisioned a "more uniform, cohesive body of substantive and procedural law," so as to "greatly diminish the bases for litigation of jurisdictional issues . . . ." H.R. REP. NO. 95-595, at 46 (1977). Congress thus conferred on the courts of bankruptcy "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases." *Id.* at 48; *see, e.g.*, *In re Dow Corning Corp.*, 86 F.3d 482, 489 (6th Cir. 1996). This was also critical to accomplishing a central purpose of bankruptcy, namely to maximize the debtor estate for the benefit of the creditors.

Congress recognized the need for a bankruptcy court to have its jurisdiction "substantially expanded" from that under the Bankruptcy Act of 1938 (52 Stat. 840). H.R. REP. NO. 95-595, at 13 (1977). This enhanced jurisdiction included the creation of a separate non-Article III court of bankruptcy with pervasive jurisdiction. *See* former 28 U.S.C. § 1471 (predecessor to 28 U.S.C. § 1334). After § 1471 was declared unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the jurisdictional provisions of the courts of bankruptcy were rewritten in 28 U.S.C. § 1334 so as to vest bankruptcy jurisdiction in the Article III district courts. Significantly, consistent with the historically broad grant of jurisdiction to the courts

of bankruptcy, § 1334 grants broad and comprehensive jurisdiction to the courts of bankruptcy.

It is clear from a plain reading of § 1334, its congressional history, and this Court's jurisprudence, that Congress' basic purpose in enacting § 1334 was to confer broad jurisdiction on the courts of bankruptcy and not to abrogate the theory of *Markham v. Allen* by applying the probate exception as a limitation on the special bankruptcy jurisdictional legislation enacted in 1978 and again in 1984.

Had Congress intended to limit or restrict the broad grant of jurisdiction in § 1334 by a probate exception, it would have specifically covered the probate area of special interest under state law, as it did with numerous subjects of state-law concern in a number of provisions in the bankruptcy law. Indeed, Congress has legislated in special areas of state interest within the Bankruptcy Code, for example, specifically in matters relating to the domestic relations. *See* 11 U.S.C. § 362(b)(2)(A), (B) and (C), and § 523(a)(5) and (15). Moreover, 11 U.S.C. § 362(b)(2) provides an exception to the automatic stay for actions to establish paternity, to establish domestic support obligations, and regarding other matters of state interest in domestic relations. Thus, several provisions of the Bankruptcy Code recognize and allow state actions involving certain areas of special state interest to proceed in a non-bankruptcy court notwithstanding a pending bankruptcy, where otherwise such actions would violate the automatic stay provisions of 11 U.S.C. § 362. Congress knew how to write an exception into bankruptcy legislation when it intended to do so. Congress could thus have written a probate exception into § 1334 if it intended to do so. Because it did not do so, such an exception should not be implied.

Amici urge the Court to apply the theory of *Markham v. Allen* and to hold that the Ninth Circuit erred when it ruled that the probate exception stripped the court of bankruptcy of jurisdiction to hear the Debtor's suit.

III. The Bankruptcy-Related Provisions for Abstention from the Exercise of Specially Conferred Bankruptcy Jurisdiction Are Controlling.

Pursuant to 28 U.S.C. § 1334(c)(1), a court of bankruptcy may, "in the interest of justice, or in the interest of comity with State courts or respect for State law," abstain from hearing a proceeding "arising under title 11 or arising in or related to" a debtor's bankruptcy case. Even though a debtor's cause of action asserted in a court of bankruptcy may have common facts with proceedings in a probate court, abstention by the bankruptcy court should not be automatic. Rather than have the exercise of its jurisdiction immediately blocked by the probate exception, the question of whether a court of bankruptcy should exercise its jurisdiction should first be heard and determined by that court pursuant to § 1334(c)'s provisions and its abstention standards developed thereunder by the courts. Providing for abstention under the principles and factors developed under the bankruptcy legislation is vastly different from construing bankruptcy jurisdiction to be automatically limited by an implied exception.

In deciding whether to abstain under § 1334(c)(1) from exercising its specially conferred jurisdiction, the courts, notably the Court of Appeals for the Ninth Circuit in *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990), have developed many factors to be considered, including

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Id. at 1167 (ruling abstention proper after consideration of 12 factors); *see also In re Eastport Associates*, 935 F.2d 1071, 1079 (9th Cir. 1991) (upholding decision not to abstain because "factors regarding the administration of the bankruptcy estate outweighed the interest in deferral to state courts").

The bankruptcy abstention provisions and the factors developed thereunder leave ample room for consideration of state law issues and state court concerns. In deciding whether to abstain under § 1334(c)(1), however, courts of bankruptcy are likely to decline to probate wills or to administer a decedent's estate.

In contrast to permissive abstention under § 1334(c)(1), under limited circumstances mandatory abstention pursuant to § 1334(c)(2) is required as to a state law cause

of action, but only if, as provided in that subsection, the party seeking abstention has made a motion for abstention. Like subsection (c)(1), subsection (c)(2) does not operate automatically. Subsection (c)(2) provides for abstention only if its many preconditions are present, including that, in addition to the requirement of filing a motion for abstention, the cause of action did not arise under title 11 or in a case under title 11, and that among other things, there be an absence of federal jurisdiction other than under § 1334, a pending action in state court having jurisdiction of the cause of action in suit, as well as the availability of a timely adjudication in the state court which does not interfere with the orderly administration of the debtor estate.

In this case, the Respondent moved for abstention under both subsections (c)(1) and (c)(2) in the Bankruptcy Court, and again in the District Court, and both courts of bankruptcy denied his abstention motions. Although Respondent's subsection (c)(1) motion was not reviewable in the Circuit Court because of 28 U.S.C. § 1334(d), he could have sought review by that court of his subsection (c)(2) motion. Moreover, instead of dealing with the denial of Respondent's abstention motion made pursuant to § 1334(c)(2) and addressing whether abstention was improperly denied under the factors the Circuit Court itself carefully delineated in its own decision in *Tucson Estates*, 912 F.2d at 1167, the Circuit Court reversed the judgment issued below by holding that the probate exception applied to bankruptcy and automatically voided the judgment. The Circuit Court did not consider § 1334(c) to be part of the case, and its only decision was to hold that the court of bankruptcy lacked jurisdiction because of the probate exception. As the Circuit Court saw it: "Our jurisdiction on the merits depends upon whether the probate exception to federal

court jurisdiction applies to the claims [asserted by the Debtor] in a bankruptcy case." 392 F.3d at 1121.

Moreover, the fact that § 1334(e) confers exclusive jurisdiction of "property of the estate," which includes the debtor's cause of action against Respondent, does not preclude abstention by a court of bankruptcy pursuant to § 1334(c). This is because § 1334(c) provides that nothing in § 1334 prevents abstention by a court of bankruptcy. As discussed elsewhere, however, the grant of exclusive jurisdiction by § 1334(e) reinforces the conclusion that the probate exception does not apply in bankruptcy. *See* Section IV at pages 17-20 *infra*.

Automatic abstention has never been the approach of the courts in bankruptcy cases. This Court has long recognized that a court of bankruptcy should abstain from exercising its jurisdiction only in the most exceptional of circumstances. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940) (abstaining due to presence of unique question of real property law), cited in H.R. REP. NO. 95-595, at 51 (1977), and *Mangus v. Miller*, 317 U.S. 178, 186 (1942) (stating same); *see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25-26 (1983) ("[O]ur task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction."); *cf. Meredith v. Winter Haven*, 320 U.S. 228, 234-35 (1943) ("When such exceptional circumstances are not present, denial of th[e] opportunity [to have rights adjudicated] by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been

given by the highest court of the state, would thwart the purpose of the jurisdictional act.").

While the Court has not addressed the issue of abstention under § 1334(c), it is well established that abstention is a step that should generally be taken only with great reluctance. As stated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 813. This is because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* at 817. The notion that a court must take jurisdiction if it is granted to it has been prevalent since the Court's decision in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). There, the Court aptly stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.* at 404. A rule such as the probate exception that removes a portion of the jurisdiction specially conferred by Congress on the courts of bankruptcy is inconsistent with this fundamental approach.

IV. THE PARAMOUNT JURISDICTION OF THE COURTS OF BANKRUPTCY, BY VIRTUE OF THEIR EXCLUSIVE *IN REM* JURISDICTION UNDER § 1334(e), REINFORCES THE BASIC NOTION THAT ABSTENTION IS THE EXCEPTION RATHER THAN THE RULE.

Section 1334(e) confers "exclusive" jurisdiction of "property of the estate" on the courts of bankruptcy. The Court has repeatedly recognized that bankruptcy is an *in rem* proceeding. *See e.g., Hanover Bank v. Moyes*, 186 U.S. 181, 191-92 (1902); *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 275-76 (1915); *Gardner v. New Jer-*

sey, 329 U.S. 565, 574 (1947); *Katchen v. Landy*, 382 U.S. 323, 329 (1966). The Court has recognized that the *res* includes the debtor's assets or the bankruptcy "estate," *Gardner*, 329 U.S. at 574, as well as the debtor's status, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) ("A proceeding regarding the discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding.").

"This jurisdiction [of courts of bankruptcy] is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition." *See Straton v. New*, 283 U.S. 318, 321 (1931) (citing *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911)). This concept is carried into the current bankruptcy jurisdictional provisions by 28 U.S.C. § 1334(e)'s grant of exclusive jurisdiction of property of the estate.

In this case, the Debtor's counterclaim for tortious interference was a *res* subject to the *in rem* jurisdiction of the court of bankruptcy within its § 1334(e) exclusive jurisdiction. As such, the court of bankruptcy was permitted to adjudicate this claim and any defenses thereto asserted by Respondent. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. at 448 ("A bankruptcy court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question.' "). It follows, therefore, that the state probate court could not adjudicate this cause of action unless the court of bankruptcy abstained.

Further, Respondent initiated an adversary proceeding in the court of bankruptcy challenging Debtor's right to a discharge of his claim against her arising out of their family dispute. The matter of the Debtor's discharge and Respondent's bankruptcy proceedings were within the

§ 1334(e) *in rem* jurisdiction of the court of bankruptcy. That court's § 1334(e) exclusive jurisdiction was thereby triggered by Respondent, and absent abstention, jurisdiction was properly exercised by the court of bankruptcy.

Moreover, the courts of bankruptcy, by virtue of their *in rem* jurisdiction, have primary jurisdiction over all of the debtor's assets. This jurisdiction is paramount to any jurisdiction that may otherwise be conferred over the same subject matter on any other court, even including non-bankruptcy courts that have concurrent jurisdiction with the court of bankruptcy. Such paramount jurisdiction of the courts of bankruptcy has a long history. In the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the Court held that the reorganization court, rather than a special three-judge district court, had primary jurisdiction over the issue of the adequacy of the compensation to be paid for the debtor's assets. In that case, two groups of creditors sought relief in different courts. The two courts reached different decisions on "identical issues" as to the proper compensation. *Id.* at 428. The Court, on review of the orders of both courts, addressed the conflict of jurisdiction, and ruled that Congress intended the court of bankruptcy to have "primary jurisdiction" in light of the purposes of the bankruptcy law. *Id.* at 426-27. It held that jurisdiction rested exclusively in the court of bankruptcy. *Id.* at 426, 428-29.

Moreover, the Ninth Circuit itself, in *In re Crown Vantage, Inc.*, 421 F.3d 963, 971 (9th Cir. 2005), recently acknowledged that the courts of bankruptcy have paramount jurisdiction, stating: "The requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court." *See also Kalb v.*

Feuerstein, 308 U.S. 433, 439 (1940) (federal bankruptcy jurisdiction is superior to that of a state court having concurrent jurisdiction); *Matter of United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) ("Section 1334(d) [reenacted as subsection (e)] gives the bankruptcy court control of all the property. Creditors who want to enforce their liens have to do so in that court regardless of the location of the creditor or the property."); *In re White*, 851 F.2d 170, 172-73 (6th Cir. 1988) ("The jurisdiction granted in 28 U.S.C. § 1334(d) [now subsection (e)] indicates a conscious effort by Congress to grant the bankruptcy court special jurisdiction and to preclude the type of jurisdictional disputes evidenced in [*Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939)]."); *In re Modern Boats, Inc.*, 775 F.2d 619, 620 (5th Cir. 1985) (holding that the "admiralty court's previous acquisition of *in rem* jurisdiction . . . did not defeat the bankruptcy court's jurisdiction" because the "petition for reorganization withdrew jurisdiction from the admiralty court and lodged it exclusively in the district court" where the title 11 proceeding was pending) (internal citations omitted).

Following this line of authority, it is clear that the courts of bankruptcy, by virtue of their primary jurisdiction and *in rem* jurisdiction under § 1334(e), had paramount jurisdiction over the Debtor's tort cause of action, which could not be defeated except by virtue of an abstention order pursuant to § 1334(c). *Amici* urge the Court to rule that the probate exception does not repeal any portion of the jurisdiction conferred on courts of bankruptcy under 28 U.S.C. § 1334.

V. The History of the Probate Exception Explains Why It Does Not Apply to Bankruptcy.

Like all district court jurisdiction, bankruptcy jurisdiction is purely statutory. The origin of the probate exception provides an understanding of why it does not prevent a court of bankruptcy from exercising its statutory jurisdiction so as to grant a judgment on a bankruptcy debtor's tort cause of action that is enforceable only against the defendant who committed the tort, and not against the assets of a decedent's estate. As explained in *Markham v. Allen*, 326 U.S. at 494-95, early decisions established that the federal courts would not exercise their jurisdiction to probate or set aside probate of a will, or to administer a decedent's estate, although they could grant a "judgment [that] does not undertake to interfere with the state court's possession" of assets of the decedent's estate. *Id.* at 494.

The probate exception was derived from the interpretation by the courts of the scope of the first diversity jurisdiction statute, which was enacted as part of the Judiciary Act of 1789. *Id.* at 494. The theory for excepting probate matters from the diversity jurisdiction so granted in 1789 was that the "equity jurisdiction conferred by the Judiciary Act of 1789, . . . which is that of the English Court of Chancery in 1789, did not extend to probate matters." *Id.* at 494. As more recently explained by the Court in *Ankenbrandt v. Richards*, 504 U.S. 689, 698-99 (1992), in analyzing the origin of the domestic relations exception as a limitation on the exercise of diversity jurisdiction, the grant of diversity jurisdiction by the Judiciary Act of 1789 was likewise not construed to confer jurisdiction of divorce actions because in 1789 the equity jurisdiction of the federal courts did not extend to divorce actions, just as federal equity jurisdiction did not then extend to probate matters.

These exceptions thus were related to the inherently limited jurisdiction of the federal courts in 1789, and had nothing to do with bankruptcy jurisdiction. Bankruptcy relief was not available under the equity jurisdiction of the federal courts in 1789 and was first provided for in American law by the Bankruptcy Act of 1800 enacted pursuant to Art. I., § 8, cl. 4 of the Constitution. *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 1, 19 (Harvard Univ. Press 1935). Ever since the enactment of the first English bankruptcy statute in 1542, bankruptcy has always been a creature of statute. *See Sturges v. Crowninshield*, 17 U.S. 122, 142 (1819). Bankruptcy statutes never set forth a probate exception. Because bankruptcy jurisdiction did not stem from the equity jurisdiction of the federal courts in 1789 or from the statutes conferring diversity jurisdiction, and because bankruptcy statutes did not provide a probate exception, the probate exception was never applicable to bankruptcy and should not be read into bankruptcy jurisdiction, particularly as a bar to the granting of a bankruptcy judgment not directed against probate and not enforceable against assets of a decedent's estate.

VI. APPLICATION OF THE PROBATE EXCEPTION TO OUST THE COURT OF BANKRUPTCY OF JURISDICTION WOULD DEPRIVE THE ESTATE OF SUBSTANTIAL VALUE IN CONTRAVENTION OF THE GOAL OF BANKRUPTCY LAW TO MAXIMIZE THE VALUE OF THE DEBTOR'S ESTATE FOR THE BENEFIT OF CREDITORS.

Because 28 U.S.C § 1334 establishes the jurisdiction of the courts of bankruptcy to hear a debtor's suits, *Amici* contend that it must be read and interpreted in light of the fundamental goal of bankruptcy to maximize the debtor estate for the benefit of the creditors.

A. Bankruptcy Provisions Should Be Interpreted in Light of Their Congressional Purpose.

A statute should be interpreted in light of the congressional purpose for its enactment: "[C]ourts will construe the details of an act in conformity with its dominating general purpose [and] will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943).

Interpretation of bankruptcy jurisdictional statutes is no different. The Court recognizes "the congressional purpose of deriving as much value as possible from the debtor's estate." *Toibb v. Radloff*, 501 U.S. 157, 164-65 (1991) (citing *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 351-54 (1985)). Moreover, the Ninth Circuit itself acknowledged in *In re Gruntz*, 202 F.3d 1074, 1080 (9th Cir. 2000), that § 1334 "expands the historic role of the federal district courts in bankruptcy . . . so that they may deal efficiently and expeditiously with all matters connected with the bankruptcy estate," but overlooked that basic concept in its decision below. Holding, as the Circuit Court did, that bankruptcy jurisdiction is limited by the probate exception would run counter to the purposes of bankruptcy.

B. Bankruptcy Code Provisions Were Designed to Maximize the Estate For the Benefit of Creditors

The Bankruptcy Code was designed to maximize the debtor's estate for the benefit of creditors: First, upon the filing of a petition in bankruptcy, an all-encompassing bankruptcy estate is created. *See* 11 U.S.C.

§ 541. Second, the broad provisions of § 541 bring property and interests of the debtor into the bankruptcy estate. *Id.* Indeed, Congress intended to bring all of debtor's property interests including "causes of action" into the debtor's estate, H.R. REP. NO. 95-595, at 175 and 367 (1977), and made clear its intention to "bring anything of value that the debtors may have into the estate." *Id.* at 176. Likewise, as stated by the Court in *Weintraub*: "The trustee . . . has the duty to maximize the value of the estate." 471 U.S. at 352; *see also Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 444 (1999); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 204 n.8, 205 (1983).

The provisions of chapter 11 were structured on the basis of the notion that a prime purpose of reorganization is to maximize value that would be lost in liquidation. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent . . . misuse of economic resources."). In addition to the jurisdictional provisions designed to maximize the debtor estate, several other provisions exist to infuse value into the debtor estate: 11 U.S.C. § 542 mandates that all third parties, other than "custodians," turn over property in their possession to the bankruptcy trustee. The debtor estate is also enhanced by avoidance actions under 11 U.S.C. § 547 ("preferences") and 11 U.S.C. § 548 ("fraudulent transfers and obligations"), and the recovery of estate property under 11 U.S.C. § 550.

Bankruptcy jurisdiction should not be construed to be limited by the probate exception. 28 U.S.C. § 1334 should be broadly construed in furtherance of the bankruptcy goal of maximizing the debtor estate.

VII. A PARTY WHO INVOKES BANKRUPTCY JURISDICTION IS PRECLUDED FROM CONTESTING THE JURISDICTION OF A COURT OF BANKRUPTCY OVER COUNTERCLAIMS INVOLVING GENERALLY THE SAME SUBJECT MATTER THAT IS BEFORE A PROBATE COURT.

Respondent filed a proof of claim, the amount of which he denominated as "unliquidated," and also commenced an adversary proceeding against the Debtor in the bankruptcy case. By invoking the jurisdiction of the court of bankruptcy to challenge the Debtor's right to receive her discharge in bankruptcy of his claims against her, Respondent submitted to the jurisdiction of that court. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (holding that filing a proof of claim against the estate operates to subject the party to the bankruptcy court's power). In response to Respondent's bankruptcy complaint, the Debtor filed her counterclaim for tortious interference with her expectancy of an *inter vivos* gift from her late husband, which he promised to make during his lifetime. Respondent must have contemplated that the Debtor would respond to his pleadings by asserting her claim for tortious interference as a counterclaim, as mandated by Rule 7013 of the Federal Rules of Bankruptcy Procedure.[6]

Having invoked the jurisdiction of a court of bankruptcy by commencing an action in which the Debtor counterclaimed, Respondent has necessarily submitted to the court's jurisdiction over the counterclaim. In analogous circumstances, the Court held in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 849

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[6] Rule 7013 of the Federal Rules of Bankruptcy Procedure provides in relevant part: "Rule 13 F. R. Civ. P. applies in adversary proceedings . . . ." FED. R. BANKR. P. 7013. In turn, Rule 13 recognizes compulsory and permissive counterclaims.

(1986), that a party who invoked jurisdiction of a federal agency to adjudicate his claim could not be heard to object to the agency's exerci . of jurisdiction to adjudicate the adverse party's counterclaim.

Moreover, in *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001), the First Circuit Court of Appeals addressed another analogous situation. In that case, the Commonwealth of Puerto Rico, protected from federal suit by its sovereign immunity, filed a proof of claim in the debtor's bankruptcy case. The debtor responded with a counterclaim for an amount vastly more than the Commonwealth's claim. The court held that by invoking the bankruptcy jurisdiction, the Commonwealth could not contest the jurisdiction of the court to adjudicate the debtor's counterclaim. As stated by the court: "Where a state avails itself of the federal courts to protect a claim, we think it reasonable to consider that action to waive the state's immunity with respect to that claim *in toto* and, therefore, to construe that waiver to encompass compulsory counterclaims . . . ." *Id.* at 28 (italics in original).

Similarly, this Court should rule that because Respondent invoked the jurisdiction of the court of bankruptcy by the litigation he commenced in that court, he cannot now assert that such court was without jurisdiction to adjudicate the Debtor's counterclaim for tortious interference.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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